IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GERALD GEE,

Plaintiff,

v. CASE NO. 95-40031-RH

FREDERICK HUMPHRIES, et al.,

Defendants.

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ORDER ON SUMMARY JUDGMENT

(Filed Dec. 3, 1996)

In this action plaintiff Gerald Gee, formerly an assistant professor at Florida A&M University ("FAMU"), seeks damages and injunctive relief as remedies for a two-week suspension without pay, FAMU's refusal to grant him tenure, and FAMU's refusal to renew his contract. By this order I enter partial summary judgment for the defendants.

Facts

In 1977 Mr. Gee became an assistant professor of journalism at FAMU, one of the ten universities that comprise the state university system of Florida. In 1982 Mr. Gee's department chairman advised him that his "declining evaluations" and failure to obtain a doctoral degree would raise questions at the time of his expected application for tenure in 1983. Rather than undergo an evaluation for tenure, Mr. Gee accepted a demotion to

instructor, thus departing from the tenure track. As Mr. Gee has put it, FAMU then-president Walter Smith "wasn't inclined to approve my tenure application."

Mr. Gee returned to the tenure track in 1989 and, in accordance with the usual schedule for tenure-track faculty members, was expected to apply for tenure in 1994. On August 23, 1993, the dean of his school and director of his division within the school wrote a letter to Mr. Gee stating:

> [Y]ou come up for tenure this year. Unless there have been some productive activities on your part which we do not know about, we are seriously concerned about your ability to receive tenure. You should recall that Dean Ruggles has expressed concern about that in your administrative evaluations at least the last two years. We invite your attention, yet again, to the School's tenure and promotion policy statements.

(Document 169, Exhibit A, Exhibit 22).

Mr. Gee responded by letter dated September 10, 1993. He seemingly acknowledged his "woeful lack of research productivity" but argued this was more than offset by his "record in the areas of teaching and service," a record he said was "substantially better than most on our faculty."

On September 20, 1993, Mr. Gee entered the classroom shortly before the start of his Public Relations Case Studies ("PUR 4001") course. A discussion was in progress among some or all of the 14 students in the class – all of whom were black – regarding whether FAMU provided sufficient opportunities for public relations majors

to acquire practical experience. By his own account, Mr. Gee, who is white, said:

> Now I'm going to say something which may upset some of you, because I'm going to use a term that I, myself, consider offensive. What I'm about to say is *not* directed at any of you, or all of you as a class; it's just something I want you to think about . . .
>
> What I want you to be aware of is that in this day and age, a person can't sit around waiting for someone to give them something. Anyone who doesn't take advantage of the opportunities that are there, or who doesn't make opportunities for themselves may be guilty of having what some would call a "nigger mentality" – the sort of thinking that can keep us all on the back of the bus forever.

(Amended and Supplemental Complaint, document 83, at ¶ 17, ellipses in original). Not surprisingly, the remark caused at least some disruption, both immediately (two students left the class) and for some period thereafter. A number of students complained about Mr. Gee's remarks.

Following an extended investigation of the students' complaints and an opportunity for Mr. Gee to respond, on October 24, 1994, FAMU president Frederick Humphries advised Mr. Gee he would be suspended for two weeks without pay. Mr. Gee initially challenged the suspension through an administrative appeal but eventually chose to proceed in this court instead.[1]

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[1] The appeal substantially delayed service of the suspension. When the suspension actually began, Mr. Gee filed

On November 23, 1994, Mr. Gee submitted an application for tenure. Mr. Gee's dean and division head and the tenure committee of the School of Journalism all recommended denial. The university-wide tenure committee chose to make no recommendation for or against tenure. The provost recommended denial. FAMU president Frederick Humphries reviewed these recommendations and determined to recommend to the Board of Regents that it deny tenure. The Board of Regents accepted that recommendation. By letter dated April 18, 1995, Dr. Humphries advised Mr. Gee that his contract would not be renewed at the end of the spring semester of 1996. Mr. Gee's employment at FAMU ended at that time.

The Claims and Pending Motions

In this lawsuit Mr. Gee contends that his suspension, the denial of tenure and the non-renewal of his contract violated his rights to free speech under the First Amendment, as made applicable to the states by the Fourteenth, because those actions were based in whole or in part on his remarks to students in his PUR4001 class as quoted above. Mr. Gee also contends FAMU denied his rights to procedural due process under the Fourteenth Amendment. Finally, Mr. Gee contends that he was the victim of racial discrimination in violation of the Fourteenth Amendment because, had he been black, he would not have been suspended and would have received tenure.

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this lawsuit. Apparently in order to moot Mr. Gee's request for a preliminary injunction, FAMU reinstated him prior to service of the entire two week suspension.

Mr. Gee has named as defendants Dr. Humphries and other FAMU officials (in their individual and official capacities) and all members of the Board of Regents (in their official capacities).

Pending are cross-motions for summary judgment. I hold that FAMU was entitled to take disciplinary action against Mr. Gee based on the racially derogatory remarks he made to his students and that summary judgment therefore should be entered for the defendants on Mr. Gee's First Amendment claim. I hold further that the State of Florida and FAMU afforded Mr. Gee constitutionally adequate procedures in connection with his suspension and that summary judgment therefore should be entered for the defendants on Mr. Gee's procedural due process claim. Finally, I hold that whether Mr. Gee was the subject of racial discrimination is a disputed issue of fact precluding summary judgment on that issue.

First Amendment

Mr. Gee is not, of course, the first public employee to assert he suffered adverse employment action as a result of exercising his First Amendment rights. The well settled law in this circuit subjects such claims to a four-prong test. *See, e.g., Morgan v. Ford*, 6 F.3d 750, 753-54 (11th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2708, 129 L.Ed.2d 836 (1994); *Belyeu v. Coosa County Bd. of Educ.*, 998 F.2d 925, 928 (11th Cir. 1993); *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989). The first prong is fatal to Mr. Gee's First Amendment claim here.

Under this prong, a public employee can prevail on a First Amendment claim alleging adverse employment

action only if the speech at issue addresses "a matter of public concern." *Morgan*, 6F.3d at 754. *This is a question of law for the court. Connick v. Myers*, 461 U.S. 138, 148 n.7, 103 S.Ct. 1684, 1690 n.7, 75 L.Ed.2d 708 (1983). Whether speech is on a matter of public concern is to be determined based on the "content, form and context" of the speech at issue. *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690.

At a superficial level, Mr. Gee's remark could be characterized as addressing a matter of public concern because it deals with opportunities being provided to students at a public university. But the cases applying this standard make clear that a more comprehensive evaluation is appropriate. From the "content, form and context" of Mr. Gee's comment, it is plain that this was a racially derogatory remark directed at students in Mr. Gee's class. The university constitutionally could, and any university appropriately would, take corrective or disciplinary action against a professor making such a remark. Nothing in the First Amendment precludes a public employer from disciplining employees who, during the course of their public employment, issue this kind of racial invective to those in their charge. *See, e.g., Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (holding that a coach's use of the term "nigger" to "motivate" his players was not speech on a matter of public concern); *Martin v. Parrish*, 805 F.2d 583, 585 (5th Cir. 1986) (holding that professor's use of profanity in order to "motivate" his students was not speech on a matter of public concern).

It is precisely to weed out claims such as Mr. Gee's that public employees must show speech on a matter of

public concern as a prerequisite to challenging adverse employment action under the First Amendment. There must be some measure of common sense in the rules that govern public employment. As a matter of plain common sense, no employer, public or private, would tolerate this kind of remark. Indeed, tolerating this kind of remark might well subject an employer to civil rights litigation or, at the least, well founded criticism for racial intolerance. The requirement that speech be on a matter of public concern insulates a public employer from liability for enforcing the basic and reasonable standards of conduct that, as a matter of common sense, any employee reasonably can and should be expected to follow.

Mr. Gee suggests, however, that the requirement that speech be on a matter of public concern always is met by speech in a "pedagogic context." I disagree. Moreover, any special treatment afforded the "pedagogic context" would, on balance, cut against Mr. Gee. The university president (and others with authority over the operation of the university) have interests in "academic freedom" just as surely as does an individual professor. Nothing in the First Amendment precludes a university president from determining that, at his or her university, professors will not direct racially derogatory remarks at students. Whatever the contours of "academic freedom," that concept does not immunize professors from review by a university president of remarks such as those at issue here.

Mr. Gee also asserts that FAMU's rule against discrimination and harassment, which FAMU cited as grounds for his suspension, is vague. But a university,

like any other public employer, need not have a comprehensive code of conduct to govern its employees; public employees may be disciplined for good cause even without a specific written rule prohibiting the conduct at issue. It should have been obvious to Mr. Gee, from either a reading of the rule at issue or just as a matter of plain common sense unrelated to any written rule, that this kind of racially derogatory remark could and reasonably would result in corrective or disciplinary action. Mr. Gee could not possibly have thought he was free to direct this kind of remark at his students with impunity.[2]

In sum, defendants are entitled to summary judgment on Mr. Gee's First Amendment claim.

Procedural Due Process

Florida law provided Mr. Gee constitutionally adequate procedures for challenging his two-week suspension. Mr. Gee invoked those procedures initially, appealing his suspension to the Board of Regents. The Board reversed the suspension based on failure to comply with the proper procedures and remanded for further consideration at the university level. When the university again imposed the suspension on remand, Mr. Gee chose to abandon the state procedures in favor of this lawsuit.

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[2] The likelihood of discipline was so clear that, indeed, one could reasonably posit that Mr. Gee calculatedly made the remark as a basis for this lawsuit challenging the adverse tenure decision that he knew was probably coming anyway. Whether this is so, however, is a disputed issue of fact, and I give no weight to this possibility in resolving the pending summary judgment motions.

Under *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995), a plaintiff cannot forego adequate state remedies for a federal procedural due process claim. Florida law provided Mr. Gee extensive procedural rights, far exceeding the requirements of due process, as well as adequate remedies for any departure from the required procedures, including the right to eventual review in the Florida First District Court of Appeal and possibly the Florida Supreme Court. Accordingly, under *McKinney*, Mr. Gee's procedural due process claims are clearly unfounded.

Mr. Gee tries to avoid *McKinney* on the grounds that FAMU allegedly failed to follow the applicable rules or somehow kept him from invoking Florida's undeniably adequate set of administrative remedies. But even if true, this would mean only that Mr. Gee would have had to invoke the procedures available under Florida law to correct such errors. Under *McKinney*, a litigant to whom such procedures are available – that is, to whom the state affords a right to due process – simply has no claim for denial of due process.

Equal Protection

Mr. Gee asserts the defendant FAMU officials recommended the denial of tenure because Mr. Gee is white. Mr. Gee claims the FAMU officials repeatedly changed the tenure requirements, in effect raising the bar each time he appeared ready to clear it. Mr. Gee cites Dr. Humphries' letter to Mr. Gee referring to him as a "white professor" and a Wall Street Journal articie quoting Dr.

Humphries as saying Mr. Gee would have been treated differently had he been black.[3]

Defendants assert that Dr. Humphries referred to Mr. Gee as a "white professor" only in discussing Mr. Gee's racial invective to his black students. They correctly note that, in the context of a racial vulgarity, the race of the speaker may affect the meaning and import of the remark. But whether this fully explains Dr. Humphries' remark probably is a question for a jury, and in any event Mr. Gee also points to evidence that FAMU provided different explanations of what he needed to do to obtain tenure or why his efforts in that regard fell short of the mark.

In short, while Mr. Gee's evidence on this claim is thin, it is sufficient to withstand defendants' motion for summary judgment.

Proper Defendants

Mr. Gee has sued various FAMU officials in their individual and official capacities and the members of Florida's Board of Regents in their official capacities. Mr.

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[3] Mr. Gee has provided no sworn support for his assertion that Dr. Humphries made such a remark. Mr. Gee asserts, however, that the reason he has not done so is that, under Eleventh Circuit precedent, he supposedly can rely on the newspaper story. I need not resolve this issue because there is a disputed issue of fact on the Equal Protection claim with or without the newspaper story. I note, however, that the law on this is not nearly so clear as Mr. Gee claims. *See, e.g., McMillian v. Johnson*, 88 F.3d 1573, 1583-85 (11th Cir. 1996).

Gee seeks, among other things, damages and injunctive relief.

It is impossible to determine from Mr. Gee's Amended and Supplemental Complaint whether he seeks damages against any defendant in his or her official capacity. Any such claim, however, clearly would be barred by the Eleventh Amendment. Accordingly, I will enter summary judgment for the official capacity defendants with respect to any claim for damages.

If Mr. Gee prevails on his racial discrimination claim, he may be entitled to injunctive relief. To the extent he seeks such relief against the FAMU defendants in their official capacities, it is obvious that any such relief to which Mr. Gee may become entitled can be adequately provided by means of an injunction against the president of FAMU in his official capacity. Any such injunction would bind not only the president but also FAMU's employees and those in active concert with them, so long as they received notice of the injunction, as could easily be assured. *See, e.g.*, Fed. R. Civ. P. 65(d). There is therefore absolutely no reason to retain any of the other FAMU defendants as parties in their official capacities. The motion of the FAMU defendants other than Dr. Humphries for summary judgment on the claims against them in their official capacities thus will be granted.

Mr. Gee also has sued the FAMU defendants in their individual capacities. They have moved for summary judgment based on qualified immunity. Their qualified immunity defense need not be considered with respect to Mr. Gee's First Amendment and procedural due process claims because on those claims I have determined to enter

summary judgment for all defendants on the merits. With respect to Mr. Gee's Equal Protection claim, the law has long been clearly established that taking adverse employment action based on an employee's race is unconstitutional. If, as Mr. Gee alleges, that is what happened, then defendants will not be entitled to qualified immunity. In short, this is simply a factual dispute, and defendants' motion for summary judgment based on qualified immunity thus will be denied.

Finally, the members of the Board of Regents have moved to dismiss the Amended and Supplemental Complaint. They assert they did nothing wrong. But if, as Mr. Gee alleges, he would have received tenure but for his race, he will be entitled to appropriate injunctive relief against the members of the Board of Regents. Their motion to dismiss thus will be denied.

Accordingly,

IT IS ORDERED:

1. Defendants' motions for summary judgment (documents 123, 126, 166 and 169) are GRANTED IN PART and DENIED IN PART. Summary judgment is entered in favor of all defendants on plaintiff's First Amendment and Due Process claims. Summary judgment is entered in favor of all official capacity defendants on all claims for damages. Summary judgment is entered in favor of all FAMU defendants in their official capacities, other than Dr. Humphries, on all claims for injunctive and declaratory relief. Summary judgment is denied on plaintiff's Equal Protection claims for injunctive relief against Dr. Humphries. Summary judgment is denied on

plaintiff's Equal Protection claims for damages against the FAMU defendants in their individual capacities.

2. Plaintiff's motion for partial summary judgment (document 98) is DENIED.

3. The motion of the defendant members of the Board of Regents to dismiss (document 95) is DENIED.

SO ORDERED this 2d day of December, 1996.

/s/ Robert L. Hinkle
Robert L. Hinkle
United States
District Judge